IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 14TH AUGUST 2007 / 23RD SRAVANA 1929

CRL.A.No. 129 of 2003()

SC.177/2000 of ADDITIONAL DISTRICT AND SESSIONS COURT
(FAST TRACK AD HOC II), KOZHIKODE.

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APPELLANT: ACCUSED

UNNI S/O. DEVADAS,KORAKAM VEETTIL
PANTHALAYANI AMSOM, KOTHAMANGALAM DESOM,
KOYILANDY TALUK.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENT: COMPLAINANT

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 14/08/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ORDER IN CRL.M.P.NO.725 OF 2003 IN CRL. APPEAL NO. 129 OF 2003.

DISMISSED

14.8.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO.129 OF 2003

Dated this the 14th day of August, 2007

JUDGMENT

The appellant is the sole accused in S.C. No.177 of 2000 on the file of the Additional District and Sessions Court (Fast Track Ad hoc II), Kozhikode. He faced trial for the offences punishable under Section 55(a) of the Abkari Act and Rule 9 of the Foreign Liquor Rules.

2. The prosecution case against the appellant - accused was that on 2.8.1998 at 4.30 p.m. while PW.6 was engaged in checking the vehicles in the public road in front of Azhiyoor Check Post, he saw the accused sitting in a bus bearing Registration No. KEZ 1242 with a plastic bag hidden with the dothi he wore and that on examining the plastic bag, it was found to contain 20 bottles , each containing 180 ml. of Indian made foreign liquor. It was the further case of the prosecution that the accused had no licence or permit to possess the contraband articles and that he was engaged in transporting the contraband articles. To prove the case against the accused, the prosecution examined PWs.1 to 7 and produced

Exts.P1 to P9 as well as MOs.1 and 2. No oral or documentary evidence was adduced on the side of the defence. After closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. The accused denied the charges levelled against him. However, the trial court found the accused guilty under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months. The benefit under Section 428 Cr.P.C. was also granted to the accused. The trial court found the accused not guilty under Rule 9 of the Foreign Liquor Rules and acquitted him of that charge. The above conviction and sentence are challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant raised the following contentions: (i) the trial court committed serious error in finding the appellant guilty under Section 55(a) of the Abkari Act on the basis of the evidence of the official witnesses as there was no independent evidence to support the prosecution case, (ii) even accepting the evidence of the

prosecution witnesses, the finding that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not legally tenable in the light of the decisions of this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D.(Cri) 631** and (iii) even if the evidence of the prosecution is accepted, the appellant can be convicted only under Rule 11 of the Foreign Liquor Rules for violation of the notification issued by the Government of Kerala under Sections 10 and 13 of the Abkari Act which is punishable under Section 63 of the Abkari Act.

5. Considering the above contentions, this Court shall analyse the evidence adduced by the prosecution. PW.6 was the Excise Inspector attached to the Excise Range Office, Quilandy who detected the offence. He stated that on 2.8.1998 at about 4.30 p.m. he was engaged in checking the vehicles in Azhiyoor Check Post and that while checking bus bearing Registration No. KEZ 1242 he saw the accused sitting on the third seat from the back door of the bus with a plastic bag and hiding the same with the dothi he wore. He further stated that he examined the plastic bag and found 20 bottles each containing 180 ml. of Top XXX Rum and that he opened one of the bottles to find out the contents of the bottle. This witness further stated that the liquor in the bottle which was opened was

taken as sample, he then sealed the bottles and seized the same and the plastic bag as per Ext.P1 mahazar. He also stated that he prepared Ext.P8 search list and arrested the appellant - accused after preparing Ext.P9 arrest memo. This witness further stated that he produced the accused and the contraband articles before the Excise Range Office, Vadakara.

6. The evidence of PW.6 is corroborated by PW.4, the Preventive Officer of Excise Range Office, Quilandy who had accompanied PW.6 during the relevant time. PW.5, the Preventive Officer who was in charge of Excise Inspector, Vadakara stated that he produced the material objects along with the property list before the court and also submitted a requisition for sending the sample for analysis. He also stated that he proved Ext.P7 chemical analysis report. PW.7 was the Excise Inspector of Vadakara Excise Range Office during the relevant time. He stated that he completed the investigation and filed the charge against the accused. PW.1 was the conductor of the bus bearing Registration No. KEZ 1242. He admitted having put his signature in Ext.P1 mahazar. He further stated that checking of vehicles and seizure of Indian made foreign liquor being a routine procedure, he cannot identify the appellant as the person from whom MO.1 bottles were seized. PW.2 was the Preventive Officer attached to the Excise Range Office, Vadakara . He stated that at about 7

p.m. the accused and the contraband articles were produced in the range office from Azhiyoor Check Post and that he accepted the same. He also stated that he registered the case against the accused and that after preparing Ext.P2 occurrence report and Ext.P3 remand report, produced the accused before the Judicial First Class Magistrate's Court, Vadakara. PW.3 was the Village Officer who prepared Ext.P4 site plan. Relying on the evidence of these witnesses, the trial court found the appellant guilty under Section 55(a) of the Abkari Act.

7. The question to be considered is whether the evidence of these witnesses can be accepted or not. The trial court found that even in cross-examination, these witnesses categorically stated that the appellant was found in possession of 20 bottles of Indian made foreign liquor. Hence, the contention of the learned counsel for the appellant that the evidence of these witnesses cannot be accepted in the absence of any independent evidence is not sustainable. The next question to be considered is whether the possession of 20 bottles of Indian made foreign liquor would attract an offence punishable under Section 55(a) of the Abkari Act. In this context, the decisions of this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D.(Cri) 631** are relevant. In the above judgments, this Court had

categorically held that to attract an offence under Section 55(a) of the Abkari Act, the prosecution should allege and prove that the accused was in possession of the contraband articles in connection with export, import, transport or transit. Even though it was alleged by the prosecution that the contraband articles found in the possession of the appellant were imported from some other State, the prosecution had not adduced any evidence in this regard. At the same time, it can be seen that the appellant was transporting 20 bottles of Indian made foreign liquor in contravention to the notification issued by the Government of Kerala under Sections 10 and 13 of the Abkari Act. That being so, the action of the appellant can be considered as violation of Rule 11 of the Foreign Liquor Rules. In the above circumstances, the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not legally tenable and hence that finding and the conviction entered under that Section are liable to be set aside.

8. Having found that the appellant was transporting foreign liquor in violation of the Foreign Liquor Rules, the appellant can be found guilty only for an offence punishable under Section 63 of the Abkari Act. Section 63 of the Abkari Act reads as follows:

> "**For offences not otherwise provided for** :- Whoever is guilty of any act or intentional omission in contravention of any of the provisions of this Act, or of any rule or order made under this Act, and not otherwise provided for in this Act shall, on conviction before a Magistrate, be punished for each such wilful act or omission with fine which may extend to five thousand rupees or with imprisonment for a term which may extend to two years or with both."

As per the above provision, if any person is found guilty of any act or omission in contravention of any of the provisions of the Abkari Act, he can be punished with fine which may extend to five thousand rupees or with imprisonment for a term which may extend to two years or with both. The incident occurred in the year 1998 and the appellant was found in possession of 20 bottles each containing 180 ml of Indian made foreign liquor. That means the appellant was in possession of 3.6 litres of Indian made foreign liquor. As per the notification issued by the Government of Kerala, a person can possess or transport 1.5 litres of Indian made foreign liquor. Hence, considering the small quantity of Indian made foreign liquor found in the possession of the appellant, this Court feels that a sentence of fine of Rs.3000/- will meet the ends of justice.

9. Accordingly, the conviction entered against the appellant by the trial court is altered to Section 63 of the Abkari Act and he is sentenced to

pay a fine of Rs.3000/- under Section 63 of the Abkari Act and in default of payment of fine, to undergo simple imprisonment for a period of six months.

The Crl. Appeal is allowed in part.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.APPEAL NO.129/2003

JUDGMENT

14TH AUGUST, 2007.